Supreme Court, U.S.
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No.

**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1994

State of Michigan,
Petitioner,

-vs-

Frank Garcia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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139 pp

QUESTION PRESENTED

Should this Court grant certiorari to clarify double jeopardy jurisprudence where the decisions throughout the country are in disarray on the question of whether the doctrine of "implied acquittal" operates to preclude a retrial of a lesser-included "predicate" offense which operates to aggravate a greater offense (i.e., felony murder, and the predicate felony), where jury instructional error at defendant's first trial prevented the jury from actually adjudicating the merits of the lesser-included offense sought to be stricken at the retrial.

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IN THE
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Petition for a Writ of Certiorari
to the Supreme Court of the
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Now comes the State of Michigan, by Randy O. Colbry, Prosecuting Attorney in and for the County of Shiawassee, and prays that a writ of certiorari will issue to review the judgment of the Supreme Court of the State of Michigan filed on April 18, 1995, rehearing denied, May 30, 1995, which upheld a Michigan Court of Appeals decision reversing respondent's conviction for the crime of armed robbery on double jeopardy grounds.

[Citations to opinions below]

The decision of the Michigan Supreme Court was entered April 18, 1995 and is reported as **People v Garcia**, 448 Mich 442; 531 NW2d 683 (1995). In an equal division opinion, the Court affirmed the decision of the Michigan Court of Appeals filed February 7, 1994, in **People v Garcia**, 203 Mich App 420; 513 NW2d 425 (1994). Copies of the opinions are included in the appendix to this petition. [App 1a-69a]

[Jurisdiction]

The decision of the Michigan Supreme Court was filed April 18, 1995. [App 9a-69a] A petition for rehearing filed by the people of the state of Michigan was denied May 30, 1995. [App 70a] The jurisdiction of this Honorable Court is invoked under authority of 28 U.S.C. sec. 1257(3).

[Constitutional provision involved]

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Statement of facts]

The facts, as far as they are pertinent to this petition for certiorari, are set forth by the Michigan Court of Appeals in **People v Garcia**, 203 Mich App 420; 513 NW2d 424 (1994) as follows:

"This case has a long history. In 1985, while stealing a car, defendant, Frank Garcia, and his codefendant, Ronald Hammond, killed the owner. [Timothy Roger Kiley] An information was filed charging defendant with one count of felony murder, an alternative count of open murder, and one count of felony firearm. A jury trial was held. The alternative count of open murder was dismissed by the trial court and the jury was instructed on two counts: the first, felony murder, including lesser included offenses of second-degree murder pursuant to **People v Jenkins**, 395 Mich 440; 236 NW2d 503 (1975), **reh den** 396 Mich 977 (1976), and armed robbery, and a second count of felony firearm. The jury returned verdicts of guilty of second-degree murder and felony firearm, and

defendant was sentenced to life imprisonment. Subsequently, this Court reversed defendant's convictions because the jury instructions and verdict form did not contain a general verdict of 'not guilty.'" **People v Garcia**, unpublished per curiam opinion of the Court of Appeals (Docket Nos. 94233 and 94822, released 01-19-88), [App 3a]

On remand, an information was filed charging defendant with three counts: 1) second-degree murder, 2) armed robbery, and 3) felony-firearm. Defendant moved to quash the armed robbery count, arguing that he was placed in jeopardy of an armed robbery conviction by being tried for felony murder and his implied acquittal of felony murder served to bar retrial on the armed robbery charge. The trial court granted defendant's motion to quash, but an interlocutory appeal by the prosecutor was granted. A panel of this Court reversed the order quashing the armed robbery count, stating that its prior opinion in this matter did "not preclude a new

trial on the added count of armed robbery." **People v Garcia,** CA 117306 (May 15, 1989) [App 11a]

Following a second jury trial on the charges for second-degree murder, armed robbery, and felony-firearm, the jury returned verdicts of not guilty of second-degree murder and felony-firearm, and guilty of armed robbery. Defendant was again sentenced to life imprisonment. We vacate the conviction." [App 3a-4a]

The Michigan Court of Appeals reversed by holding that the first jury's failure to convict of first degree felony murder, together with the conviction of second-degree murder, necessarily established that the defendant was not guilty of the lesser-included offense of armed robbery. **People v Garcia,** 203 Mich App 420; 513 NW2d 425 (1994) [App 4a-8a]

Petitioner was granted leave to appeal by the Michigan Supreme Court and argued that respondent's armed robbery conviction was not barred by the double jeopardy clause. An equal division opinion by the

Michigan Supreme Court resulted in the affirmance of the Court of Appeals decision vacating defendant's armed robbery conviction on double jeopardy grounds.

Justice Riley, joined by Justices Boyle and Mallett, writing for reversal, held that the defendant's implicit acquittal of first degree murder did not operate as an implied acquittal of the predicate offense of armed robbery. Accordingly defendant was properly retried and convicted of armed robbery. [App 11a-33a]

Justice Cavanagh, joined by Justice Levin, writing for affirmance, stated that the collateral estoppel doctrine and same-transaction test barred defendant's retrial for armed robbery and affirmed the result reached by the Court of Appeals. [App 34a-63a] Chief Justice Brickley, joined by Justices Cavanagh and Levin, writing for affirmance, stated that the doctrine of collateral estoppel is fully applicable to this case and requires reversal of defendant's armed robbery conviction. [App 63a-69a]

[Reasons for granting the Writ]

The double jeopardy clause of the Fifth Amendment is applied to the states through the general provisions of the Fourteenth Amendment. **Benton v Maryland**, 395 US 784, 794-796, 23 L Ed 2d 707, 89 S Ct 2956 (1969). Accordingly, the minimum standards of double jeopardy protection for criminal defendants, as enunciated by numerous United States Supreme Court decisions, are binding on the Michigan Supreme Court. The Michigan Supreme Court of course is free to delineate a higher level of protection under Michigan Constitution 1963, art I, sec 15, but did not do so in this case. Accordingly, the question of whether a conviction should be treated as an implied acquittal for purposes of the double jeopardy clause of the Fifth Amendment of the United States Constitution is a question of federal, not state law. **Kennedy v Washington**, 986 F2d 1129, 1134 (CA7 1993), cert den ___US___, 127 L Ed 2d 73, ___S Ct___ (1994).

Prior to and since the publication of Anno: Conviction of Lesser Offense as Bar, 61 ALR 2d 1141 in 1958 and the decision in **Green v United States**, 355 US 184, 2 L Ed 2d 199, 78 S Ct 221 (1957) numerous Courts have decided the question of whether a conviction of a lesser offense included in the greater one charged against the defendant bars prosecution for the greater offense on a new trial obtained at the defendant's instance. The question to be decided in the case **sub judice**, while variously decided by some state and federal courts, has not been directly decided by the United States Supreme Court.

The Michigan Court of Appeals and the Michigan Supreme Court have both stated that the issue presented in this case is matter of first impression in Michigan. [203 Mich App at p 423; App 4a 448 Mich at p 466, App 33a].

In **North Carolina v Pearce**, 395 US 711, 717, 23 L Ed 2d 656, 89 S Ct 2072 (1969) the Court, relying on an analysis

Note, Twice in Jeopardy, 75 Yale L.J., 262, 265-266 (1965) said:

> [T]he Fifth Amendment guarantee against double jeopardy ... has been said to consist of three separate constitutional protections. [1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protections against multiple punishment for the same offense.

In **The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences**, 78 Mich L Rev. 1001 (1980), author Peter Weston maintains that the most serious problem is with the first of the three rules--the prohibition on a retrial following an acquittal. He opines that the Court experiences more "confusion," overrules more prior decisions, and faces more unresolved issues in the field of acquittals than in any other area of double jeopardy. [pp 1065, 1066]

The California Supreme Court has stated that the decisions throughout the country are in disarray on the issue of

giving effect to implied partial verdicts of acquittal on a charged offense where the jury is deadlocked as to an uncharged lesser included offense. See **Stone v Superior Court of San Diego County**, 31 Cal 2d 503, 646 P2d 809 (1982). In **Mauk v State**, 91 Md App 456, 605 A2d 157, 168 (Md 1992) the Court, in attempting to conceptualize a retrial following certain legal events, such as 1) appellate reversal of an earlier conviction, 2) the granting of a new trial by a trial judge following a conviction, or 3) the declaration of a mistrial, said the perplexing philosophical problem has bedeviled the United States Supreme Court for nearly seven decades.

The Michigan Court of Appeals and the Michigan Supreme Court equal division opinion, per Justices Cavanagh and Levin, JJ., and Brickley, CJ., for affirmance have decided a federal question and interpret the Fifth Amendment in a way that is in conflict with decisions of state and federal courts of appeal and

this Court. [App 4a-7a; 34a-69a] See e.g., **Potts v State**, 258 Ga 430, 369 SE2d 746 (1988); **Johnson v Commonwealth**, 221 Va 736, 273 SE2d 784 (1981); **Edmonds v United States**, 106 US App DC 373, 273 F2d 108 (1959), cert den 362 US 977, 4 L Ed 2d 1012, 85 S Ct 1062 (1960); **United States v Gooday**, 714 F2d 80 (CA9 1983), cert den 468 US 1217, 82 L Ed 2d 884, 104 S Ct 3587 (1984); **Cichos v Indiana**, 385 US 76, 17 L Ed 2d 175, 87 S Ct 271 (1966).

Petitioner further maintains that the respective opinions of the Michigan Court of Appeals and Michigan Supreme Court [per Cavanagh and Levin, JJ., and Brickley, C.J., for affirmance of the Court of Appeals reversal of respondent's armed robbery conviction, **supra**] have expanded the double jeopardy clause of the Fifth Amendment beyond any decision of the United States Supreme Court.

Accordingly, petitioner maintains that the issue is ripe for review, for as recently stated by this Court in **Anderson v Green**, 513 US___, 130 L Ed 2d 1050,

1053, ___S Ct___ (1995) "ripeness is peculiarly a question of timing," and "it is the situation now rather than the situation at the time of the [decision under review] that must govern."

As stated above double jeopardy engenders three basic protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and, (3) it protects against multiple punishments for the same offense. See **People v Gonzalez**, 197 Mich App 385, 496 NW2d 321 (1992), **lv den** 442 Mich 920; **People v Crawford**, 187 Mich App 344, 467 NW2d 818 (1991); **People v Anderson**, 409 Mich 474, 295 NW2d 482 (1980).

It is the scope of the first protection that is implicated in the case at bench. The scope is said to be broad and its proscription absolute. See generally **United States v DiFrancesco**, 449 US 117, 66 L Ed 2d 326, 101 S Ct 426 (1980). The reasons are stated thusly:

> The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [**Green v United States**, 355 US 184, 187-188 (1957)]

At his first trial which concluded on April 7, 1986 respondent Garcia, although charged with first-degree felony murder, [murder committed during the perpetration of an armed robbery] was jury-convicted of second degree murder, MCL 750.317; MSA 28.549 and felony firearm, MCL 750.227b; MSA 28.424(2). Respondent's first appeal of right to the Court of Appeals resulted in reversal based on the procedural failure of the trial court to permit the jury to return a general verdict of not guilty on Count I, felony murder. [**People v Garcia**, 203 Mich App 420, 513 NW2d 425 (1994); App 3a]

Petitioner maintains that reversal of respondent's armed robbery conviction obtained at the retrial is inconsistent with the better reasoned cases holding that implied acquittal does not necessarily preclude a retrial on a lesser included offense where the jury was not given a full opportunity to make that decision.

In a long line of cases commencing with **Ball v United States**, 163 US 662, 672, 41 L Ed 300, 16 S Ct 1192 (1896), the United States Supreme Court has held that the constitutional guarantee against double jeopardy imposes no limitation whatever upon the power of the court to retry a defendant who has succeeded in having his first conviction set aside. The Supreme Court has adhered to this doctrine in more recent cases. See e.g., **Tibbs v Florida**, 457 US 31, 40, 72 L Ed 2d 652, 102 S Ct 2211 (1982) quoting **North Carolina v Pearce, supra.** See also **Addison v Parratt**, 208 Neb 459, 303 NW2d 785, 787 (1981) and citations.

In **Montana v Hall**, 481 US 400, 403, 95 L Ed 2d 354, 107 S Ct 1825 (1982) the Court in its per curiam opinion said:

> It is a "venerable principl[e] of double jeopardy jurisprudence " that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, [citation] poses no bar to further prosecution on the same charge." [Citation] See generally 3 W. LaFave & Isreal,, Criminal Law Procedure sec. 24.4 (1984)...

Stated another way, the appellate success of a defendant does not equal acquittal, except where the evidence is held legally insufficient to have supported the conviction in the trial court. See **Burks v United States**, 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141 (1978); **People v Langley**, 187 Mich App 147, 150, 466 NW2d 724 (1991).

Even this standard is less than clear: double jeopardy does not bar a re-trial where a guilty verdict is held, by a trial judge or appellate court to be "against the weight of the evidence." **Tibbs v Florida, supra** 457 US at pp 42-44, 72 L Ed 2d 652, 102 S Ct 2211.

In **United States v Bizzard**, 615 F2d 1080 (CA5 1980), cert den 459 US 973, 74 L Ed 2d 286, 103 S Ct 305 (1982), the defendant could be retried without violation of the double jeopardy clause of the Fifth Amendment where the appellate court reversed on an issue of trial error.

In **United States v Coward**, 669 F2d 180 (CA4 1982), cert den 456 US 946, 72 L Ed 2d 470, 102 S Ct 2014 (1982), the Court held that the double jeopardy clause did not preclude retrial of one defendant where the prior reversal was due to the trial judge's failure to order a separate trial for codefendants.

In **United States v Fitzpatrick**, 581 F2d 1221, 1224, n. 4 (CA5 1978), it was said that where there is a reversal on an issue of trial error, the defendant may be retried without violation of the double jeopardy clause.

In **United States v DiFrancesco**, 449 US 117, 131, 66 L Ed 2d 328, 101 S Ct 426, 66 L Ed 2d 328 (1980), this Court said:

> Finally, if the first trial has ended in a conviction, the double jeopardy guarantee "imposes no limitation whatever upon the power to **retry** a defendant who has succeeded in getting his first conviction set aside." (emphasis in original) **North Carolina v Pearce**, 395 US, at 720, 23 L Ed 656, 89 S Ct 2072. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to convictions." (citation omitted) "(T)o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." (Citation omitted)

In the case **sub judice**, the Justices for reversal and reinstatement of respondent's conviction, [Riley, Mallet and Boyle, JJ.] rely on some very formidable and well reasoned federal and state court decisions, e.g., **Edmonds v United States**, supra; **United States v Gooday**, 714 F2d 80 (CA9 1983); **Potts v State**, 369 SE2d 746 (1988); and **Johnson v Commonwealth of Virginia**, 273 SE2d 784 (1981). [App 18a-23a, 33a]

In **Edmonds v United States, supra**, the defendant had been found guilty of second degree murder as a lesser included offense under the indictment's first degree murder count. On appeal, the conviction was reversed and defendant retried for second degree murder under the first degree count. On his second appeal, Edmonds argued that the jury's second degree verdict was an implied acquittal on the indictment's first degree count under **Green v United States**, which thus made him immune from further prosecution for any offense included under the indictment's first degree charge. The argument was rejected on appeal where it was held that **Green** did not bar, on double jeopardy grounds, a new trial under the indictment for second degree murder even though Edmonds could not be retried on the greater first degree count specified in the indictment.

In **United States v Gooday, supra**, the Court found that the **Edmonds** case correctly interpreted **Green** as granting

independent force to lesser included offenses on which a jury has been instructed under one count of the indictment. It was thus held that an acquittal on the indictment's first degree murder count did not preclude retrial on three lesser included offenses on which the jury was deadlocked.

In **Johnson v Commonwealth of Virginia, supra**, the defendant's capital murder conviction was reversed for instructional error. Although he had been found not guilty of robbery, the Court rejected his double jeopardy argument. There it was held that the jury did not resolve the issue of the defendant's guilt of armed robbery. The Court said that it "would stultify itself to hold that the jury in this case made a factual finding that Johnson was innocent of robbery. We would have to find that it ignored the court's instruction and that its finding of not guilty under Count I was completely unrelated to the express direction it had received from the court to return such a

verdict if it found defendant guilty of capital murder." See App 19a-20a, fn 16]

In **Staael v State**, 697 P2d 1050 (Alaska App 1985) the Court said that while there is authority for the proposition that one acquitted of a greater offense cannot be separately tried for a lesser-included offense, it is well established that a defendant may be retried when a hung jury results in a mistrial, citing **Richardson v United States**, 468 US 317, 82 L Ed 2d 242, 104 S Ct 3081 (1984). The Court further states that whether acquittal of a greater offense and a hung jury on a lesser-included offense precludes retrial of the lesser offense has led to a split of authority, but concluded that the better reasoned cases, which constitute the majority of those considering the issue, hold that retrial on a lesser offense is not barred, citing **United States v Gooday, supra; United States v DeVincent**, 632 F2d 155 (CA1 1980); **Forsberg v United States**, 351 F2d 242 (CA9 1965), cert den 383 US

950, 16 L Ed 2d 212, 86 S Ct 1209 (1966); **Stone v Superior Court, supra; United States v Larkin**, 605 F2d 1360 (CA5 1979), modified on reh, 611 F2d 585 (1980), cert den 446 US 936, 64 L Ed 2d 793, 100 S Ct 2160 (1980); and **Edmonds v United States.** [**Staael v State**, 697 P2d at p 1055, fn 2.]

In **State v Seagroves**, 691 SW2d 537 (Tenn 1985) the Tennessee Supreme Court, adopting the rationale of **Gooday, supra**, held that the double jeopardy clause did not preclude a retrial of defendant after a mistrial was declared at an earlier trial where the jury could not reach a verdict on lesser offenses included in the crime for which defendant was indicted. See also **State v Despenza**, 38 Wash App 645, 689 P2d 87, 93 (1984) where the Court said that it could not imply from the failure to reach a verdict that the jury acquitted the defendant of the greater offense, citing **People v Griffin**, 58 Cal Rptr 459 (1967); **State v Dykstra**, 33 Wash App 648, 656 P2d 1137 (1984).

In **Potts v State, supra,** 369 SE2d at 747, the defendant claimed that under the **Green-Price** rule his jury impliedly acquitted him of the greater crime of kidnapping with bodily injury by convicting him of the lesser offense of kidnapping. The Court rejected the argument on two grounds:

> ... One reason is that an unambiguous conviction of a lesser-included offense is a necessary predicate for application of the **Green-Price** rule. In **Potts v Zant, supra,** 734 F2d at 530 the Court of Appeals for the Eleventh Circuit concluded that the verdict on Count Three was ambiguous. Our review of the record of Pott's trial likewise leads us to conclude that the verdict on Count Three was ambiguous.
>
> Our second reason is that the **Green-Price** rule does not apply unless the trial court gives the jury a full opportunity to return a verdict on the greater charge. The record of Pott's trial shows that the court did not give the jury a full opportunity to convict Potts of kidnapping with bodily injury.

cf., also **United States v Lagerquist,** 758 F2d 1279 (CA8 1985) where the Court held that a prior appellate court reversal of a conviction on a jurisdictional ground

which did not reach the merits, and not in the nature of an acquittal--held Double Jeopardy inapplicable.

The term "acquitted" or an "acquittal" is used in criminal law in contexts indicating a decision on the merits by a fact finder following the attachment of jeopardy. **Gikas v Zolin**, 863 P2d 745 (Cal 1993). In **United States v Scott**, 437 US 82, 57 L Ed 2d 65, 98 S Ct 2187 (1978) it was said:

> "the term 'acquittal,' . . . generally refers to a disposition based upon a determination of the merits. [Fn. omitted.] '[A] defendant is acquitted only when "the ruling of a judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the actual elements of the offense charged." [Citation]' [defining the term in the context of double jeopardy.]

With respect to the concept of "implied acquittal" it is said that it results from a ruling which resolves in the defendant's favor some or all of the required elements of the offense. Moreover, an implied acquittal barring re-prosecution must necessarily entail a

determination that one of the offenses charged was the lesser included offense of the other. And it is only where the jury is given the full opportunity to return a verdict either on the greater or, alternatively, on the lesser included offense does the doctrine of implied acquittal obtain. See **United States v Reed**, 617 F Supp 792, 800 (Md 1985).

In **People v Wiley**, 169 Ill App 3d 140, 523 NE2d 1344, 1346 (1988) the Court said that an erroneous ruling of law where the trial court does not rule on the sufficiency of the evidence does not constitute an implied acquittal.

In **State v O'Kelley**, 113 NM 25, 822 P2d 122 (1991) the defendant claimed that his conviction for DUIL constituted an "implied acquittal" of vehicular homicide. In rejecting the argument the court said that an implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser. The Court observed that in this situation the great

majority of cases in this country have regarded the jury's verdict as an "implicit acquittal" of the greater offense citing **Green v United States, supra.** The Court declared however, that it is only where the jury is given the **full opportunity** to return a verdict either on the greater or alternatively on the lesser offense that the doctrine of implied acquittal has application, citing **United States v Reed, supra.**

In **Commonwealth v Tabb**, 491 Pa 372, 421 A2d 183 (1980), cert den 450 US 1000, 68 L Ed 2d 202, 101 S Ct 1708 and **Commonwealth v Klobuchir**, 486 Pa 241, 405 A2d 881 (1979), cert den 445 US 952, 63 L Ed 2d 787, 100 S Ct 1602 (1980) the Pennsylvania Supreme Court said that "the **sine qua non** for finding implicit acquittal is a failure to convict in the face of **full opportunity** for conviction." [emphasis added] In **Commonwealth v Ward**, 493 Pa 115, 425 A2d 401 (1981), cert den 451 US 974, 68 L Ed 2d 354, 101 S Ct 2055, the Court said this result is based on the

unequivocal language in Green revealing quite clearly why the United States Supreme Court concluded that an implicit acquittal had occurred:

> Green was in **direct peril** of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder, it chose the latter. In this situation, the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder...
>
> (The jury) was given a **full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.** Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged. (Emphasis supplied).

Petitioner respectfully submits that in the case **sub judice**, the Justices for reversal and reinstatement of defendant's conviction [Riley, Mallett and Boyle, JJ.], [App 11a-33a] were correct in their analysis and conclusion that the implied

acquittal aspect of the double jeopardy clause did not prohibit the reprosecution of defendant for the crime of armed robbery. That is, the double jeopardy clause is not implicated where, in a case such as this, the jury was not afforded a **full opportunity** to convict defendant of armed robbery, and further, that the jury's verdict "is inherently ambiguous, given the fact that it was allowed to return only one verdict." [App 33a]

To this petitioner would add, that where the trial court's jury instructions and the verdict form did not permit the finding of a general not guilty verdict on Court I, coupled with the written directive on the verdict form that they could choose only one verdict, such limiting instruction constitutes an "extraordinary circumstance" contemplated by the Court **Green** as preventing the jury from having a full opportunity to render a verdict as to each count.

Chief Justice Brickley, in his concurring opinion to affirm the reversal

of respondent's conviction, [App 63a-69a] sets forth a scholarly discussion concerning the applicability of collateral estoppel. In particular the discussion involves the presumption of a rational jury. Petitioner maintains that the discussion is too limited and that when the rational jury concept is properly considered and applied, it too is supportive of the position of the petitioner.

In **Ashe v Swenson**, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189 (1970) the question before the Court was "Whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." This Court held that it could not. In explaining its decision and its application of the double jeopardy clause, **Ashe** emphasized that the verdict at the first trial should be viewed "with realism and rationality". **Ashe v Swenson**, 397 US at 444, 25 L Ed 2d 469, 90 S Ct 1189.

It is important to observe that in **Ashe**, the jury at the first trial did not render just a general verdict of not guilty, but rather, although not required to do so, returned a verdict of "**not guilty due to insufficient evidence.**" In the case **sub judice**, by contrast, the jury returned a verdict of second degree murder. [emphasis added]

Ashe informs us that, by a study of the issues presented to the jury at the first trial, what was decided may rationally be determined. Thus, the "rational jury" test:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue **other** than that which the defendant seeks to foreclose from consideration. [397 US at 444, 25 L Ed 2d 469, 90 S Ct 1189]

Petitioner maintains that under the rational jury approach the respondent's armed robbery conviction at the retrial

should have been reinstated by the Michigan Supreme Court. As stated above, what a rational jury could and could not have decided is determined by an examination of what was presented to the jury, what was argued to it. In order to do justice in the case at bench it is obligatory that the Court consider the effect of the trial court's limiting instructions concerning possible verdicts. Petitioner, for its part, maintains that an intellectually honest appraisal thereof should compel a finding that the only **rational** explanation for the second degree murder verdict at respondent's first trial is that the jury, on due consideration of the evidence, the defensive posture assumed by respondent, [i.e., defendant was tried on an aiding and abetting theory, using duress as his defense (see App 19a)] and adherence to the instructions of the trial court, entered only one verdict. In this case the jury was specifically instructed "1st Degree Felony Murder, Possible Verdicts, **You may**

return only one verdict on this charge. Mark only one box for this count." [App 12a, 34a] [Emphasis added]

Presuming that the Shiawassee County jury in this case was a rational jury, then it is said that the usual assumption is that the jury follows the instructions of the court. **Kennedy v Washington, supra** 986 F2d at 1132. Accordingly, it must be presumed that the jury in the case **sub judice** rendered its verdict of second degree murder in accord with the trial court's specific and limiting instructions. The jury, in accord with these instructions, as with the voting process in our election culture, did not want to spoil its ballot. For example, in the election process, voters are often instructed on the ballot that they are to vote for one candidate or one proposal only, lest their ballot be spoiled and not counted. Thus, the verdict of second degree murder in the case **sub judice**, answers the question posed in **Ashe**. Petitioner submits that since **Ashe**

mandates that the Court consider only what the jury may have rationally done, it may be fairly concluded that no determination was made as to the charge of armed robbery at respondent's first trial. Thus respondent was not impliedly acquitted of armed robbery.

No one should gainsay that the Justices for affirmance [Cavanagh and Levin, JJ., and Brickley, C.J.] set forth very compelling arguments for their respective positions. [App 34a-69a] Petitioner maintains however, that when contrasted with the better reasoned decisions on the subject, this Court should be persuaded to find that respondent Garcia's retrial and armed robbery conviction is not barred on double jeopardy grounds.

Petitioner's position finds further support in other cases not cited in the Michigan Court of Appeals or Michigan Supreme Court opinions. For example, in **Commonwealth v Nardone**, 406 Mass 123, 546 NE2d 359 (1989) the Court rejected the

defendant's double jeopardy argument. The Court points out that normally, the law treats a jury's decision to convict of a lesser-included offense as an implied acquittal on the offense charged. Further, even though retrial of a defendant whose conviction is reversed is not barred, [citing J.R. Nolan, Criminal Law, sec. 692] a defendant convicted of a lesser-included offense normally cannot be retried on the greater offense initially charged. The Court said in particular:

> . . . Where a defendant attacks the very error that resulted in his conviction on the lesser offense rather than the main offense, we hold that retrial on the main offense is not barred. In this respect, this case is the same as the situation in which a conviction is reversed because of an improper jury instruction on the elements of an offense but retrial on that offense is nevertheless permitted. [**Commonwealth v Nardone**, 546 NE2d at p 366]

The Court explains that this Court's holding in **United States v Green** is not to the contrary.

> . . . In **Green**, where the defendant had been charged with first degree murder and convicted of second degree murder (with the

> jury remaining silent on first degree murder), the Court held that retrial for first degree murder was barred by double jeopardy. This ruling was based in part, however, on the rationale that a conviction on a lesser offense necessarily implies acquittal on the main offense charged. id. at 190, 78 78 S Ct at 225. For the reasons stated above, we find this reasoning inapplicable on the present facts. [**Commonwealth v Nardone**, 546 NE2d at p 366]

The Court in **Nardone** also found that decisions subsequent to **Green** establish that failure by a jury to return a verdict on an offense charged does not invariably bar retrial for that offense, citing **Cichos v Indiana**, supra. In **Cichos** the defendant was charged with both involuntary manslaughter and reckless homicide, two offenses having essentially the same elements, but substantially differing penalties under state law. The defendant was initially convicted of the less serious crime of reckless homicide, [with the jury remaining silent on involuntary manslaughter], but his conviction was reversed on appeal and he was retried on both of the original charges. In that

setting the Supreme Court agreed with the Supreme Court of Indiana that the defendant's retrial had not been barred by double jeopardy because "a verdict of guilty of reckless homicide [did] not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter, quoting **Chicos v State**, 246 Ind 680, 208 NE2d 685, 688 (1965) and **United States ex rel Jackson v Follette**, 462 F2d 1041 (CA2) and W.R. LaFave & F.H. Israel, Criminal Procedure, sec. 24.4 (1984) (stating that the **Green** rule is not applicable in all instances in which a jury does not return a verdict on some count.) [**Commonwealth v Nardone**, 546 NE2d at p 366]

In fn 7 the Court is careful to explain that technically the result in **Cichos** was the dismissal of the writ of certiorari as improvidently granted. Apparently, the Court granted certiorari to consider whether the double jeopardy clause should be incorporated through the Fourteenth Amendment against the States.

Since the Court concluded that retrial did not violate Green, the case did not raise the issue of incorporation of the double jeopardy clause.

In **United States v Miller**, 952 F2d 866 (CA5 1992), cert den,___US___, 120 L Ed 2d 900, 112 S Ct 3029 (1992) it was said that where the Court does not make findings as to the sufficiency of evidence, its decision does not raise a double jeopardy bar to a retrial:

> ... As this Court foreshadowed in the first appeal, both of these grounds for reversal are mere trial errors for which double jeopardy principles do not preclude retrial: "Since reversal is based on defects in the indictment and jury instructions rather than on insufficiency of the evidence, there is no apparent obstacle to retrial should the government seek a new indictment." 841 F2d at 112. The Supreme Court has so held specifically with respect to defects in the charging instrument in **Montana v Hall** [cit. om.] and **United States v Ball**, [cit. om.] and with respect to jury instructions in **Forman v United States**, [cit. om] cited in **Tateo**, 84 S Ct at 1589.

The Court also discusses **Richardson v United States**, 468 US 317, 82 L Ed 2d 242, 104 S Ct 317 (1984) where the Supreme

Court held that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy, [citations omitted.] The Court further explains:

> ... We recognized that **Richardson** was an appeal asserting a double jeopardy claim which followed a mistrial, but its holding is clearly not limited to such cases. It refuses to extend **Burks** beyond instances in which the appellate court in fact reversed for insufficient evidence. As the Court explained: "Our holding in **Burks** established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal ...." [cit. om.] The central concept of **Richardson** is that there is no double jeopardy unless the original jeopardy has **terminated**; and it is abundantly clear that a reversal for instructional error is no more than a termination of jeopardy than a mistrial where the jury is unable to agree. And it is evident that the implications of **Richardson** for a case such as this one did not escape the attention of the **Richardson** court. Indeed, Justice Brennan in dissent complained of the Court's narrow reading of **Burks**: "Apparently, under the Court's approach, only an actual judgment of acquittal, or an unreversed conviction, would 'terminate' jeopardy and thereby bar retrial. (Brennan, J.,

> dissenting). He further complained that the Court's holding in **Burks** could be undermined by appellate court refusals to rule on insufficiency of the evidence claims and instead reversing on other grounds. Id., at 3089. [**United States v Miller**, 952 F2d at pp 870-872]

Following **Richardson**, the Court held that double jeopardy did not bar the retrial, and because under **Richardson** jeopardy has not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result. The Court also noted that its holding in this respect is supported by **United States v Porter**, 807 F2d 21 (CA1 1986). [**United States v Miller**, 952 F2d at p 874]

cf., also **United States v Stevens**, 38 F3d 167, 170 (CA5 1994) where the Court said that because we make no finding as to the sufficiency of the evidence, our decision does not raise a double jeopardy bar to defendant's retrial, citing **United States v Miller, supra.**

Petitioner maintains that where the respondent's conviction is reversed

because of instructional error the principles of double jeopardy do not bar his reprosecution at a duly granted retrial for the offense of armed robbery.

The Michigan Supreme Court correctly observes that the charges in the instant case were based on a 1985 carjacking and fatal shooting and the the prosecution's theory was that during the carjacking the two defendants abducted victim Kiley. When Kiley refused to get into the trunk Hammond shot and killed him. [App 12a, 35a]

Justice Cavanagh, as alternative grounds for upholding the Court of Appeals reversal of the armed robbery conviction, discusses the doctrine of collateral estoppel and the multiple punishment strand of double jeopardy, relying on **Harris v Oklahoma**, 433 US 682, 53 L Ed 2d 1054, 97 S Ct 2912 (1977) and other cases. He argues that respondent's conviction for robbery at the second trial was based on essentially the same facts as presented at the first trial. [App 53a-5a]

In response thereto, petitioner submits that the Court erroneously construes **Harris** (a successive prosecution case) to flatly prohibit cummulative punishment for both felony murder and the underlying felony, even when the convictions and sentences arise from a single trial. See **Todd v State**, 884 P2d 668, 678. fn 8 (Alaska App 1994) discussing **Munson v State**, 758 P2d 324, 332 (Okl Crim 1988), cert den 488 US 1019, 102 L Ed 2d 809, 109 S Ct 820 (1989).

While it appears that the rule emerging from **Harris** and its progeny is that the double jeopardy clause bars prosecution for both felony murder and the underlying felony, this Court in **Illinois v Vitale**, 477 US 410, 65 L Ed 2d 228, 100 S Ct 2260 (1980) elaborated on its holding in **Harris** stating that "for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course

of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." **Id.** at 420

Cases decided subsequent to **Vitale** have held that convictions of both felony murder and a felony arising out of the same occurrence need not be invalidated where it is shown that another separate felony could have served as the predicate offense underlying the felony murder charge. For example in **Sekou v Blackburn**, 796 F2d 108 (CA5 1986) it was held that there would be no double jeopardy violation where the defendant was found guilty of armed robbery at trial and later pleaded guilty to felony murder "if the state could have proved felony-murder without also proving armed robbery." [p 111] It was apparent from the facts in **Sekou** that the state could have proved kidnapping as an alternative underlying felony. **Id.** n. 3. See also **Neville v Butler**, 867 F2d 886 (CA5 1989).

In the case **sub judice**, although not charged, it appears from the record and the discussion of the Michigan Supreme Court that the prosecution could have proved kidnapping [i.e., the abduction of victim Kiley, (App 35a)] as an alternative underlying felony as in the **Sekou** decision. Petitioner submits that in light of **Vitale** and **Sekou** the Court's reliance on **Harris v Oklahoma** as an alternative ground for affirmance of the reversal respondent's robbery conviction is substantially undermined. Accordingly such argument is not an acceptable basis for the vacatur of respondent's conviction.

While the Justices for affirmance have presented scholarly discussions concerning the applicability of collateral estoppel to the case **sub judice**, [App 34a-69a] petitioner respectfully submits that further consideration of this concept is necessary.

Ashe v Swenson, supra, holds explicitly that collateral estoppel is a

part of the constitutional protection against double jeopardy--an unsurprising conclusion since double jeopardy is the criminal counterpart of the civil doctrine of res judicata, of which the principle of collateral estoppel is a part. See **Kennedy v Washington, supra; Dowling v United States,** 493 US 342, 347, 107 L Ed 2d 708, 110 S Ct 668 (1990).

In **Kennedy, supra,** the Court informs us that "Collateral estoppel (issue preclusion) has never been as rigid as res judicata is in its sense as claim preclusion. A finding is entitled to collateral estoppel effect only if it is the product of a fair hearing." citing **Montana v United States,** 440 US 147, 164, n 11, 59 L Ed 2d 210, 99 S Ct 970 (1979); **Kairys v INS,** 981 F2d 937, 939-40 (CA7 1992), cert den ___US___, 123 L Ed 2d 460, 113 S Ct 1832 (1993). The Court also points out that an acquittal bars reprosecution, however deficient the procedure that resulted in the acquittal, citing **Fong Foo v United States,** 369 US

141, 7 L Ed 2d 629, 82 S Ct 671 (1962) (per curiam). The Court then states:

> But that illustrates the res judicata component of double jeopardy, not the collateral estoppel component--and acquittals, as we have pointed out, have no collateral estoppel effect. Implied acquittals can have such an effect, but only because an implied acquittal is an express conviction, and a conviction implies the jury found certain facts to have been proved beyond a reasonable doubt. [**Kennedy v Washington**, 986 F2d at p 1135]

In **Kennedy, surpa**, the Court held that retrial of the defendant for murder after the jury verdict convicting him of both murder and voluntary manslaughter had been reversed on appeal was not precluded by the collateral estoppel component of double jeopardy, absent an express or implicit finding that the defendant had been acting in sudden and intense passion as required for voluntary manslaughter under Illinois law.

The scholarly collateral estoppel discussion of Justice Cavanagh in the case at bar, [App 34a-54a] while undoubtedly persuasive, should not be dispositive of

the double jeopardy issue in this case.

Justice Cavanagh's collateral estoppel argument sets forth various theories to support his conclusion that respondent's retrial for armed robbery was improper. He says that the jury either found that "at least one of the elements of armed robbery was not proven beyond a reasonable doubt" [App 52a], or, the first jury determined that all the elements of murder had been proven beyond a reasonable doubt when it convicted defendant of second degree murder and that "If the jury had also determined that the prosecutor had proven beyond a reasonable doubt that the defendant was guilty of armed robbery, it was **obligated** by the jury instructions to return a verdict of guilty of first degree murder. [52a]

The problem with Justice Cavanagh's argument is that there is no reliable basis in fact for his conclusion.

In **Stone v Superior Court of San Diego Co.**, 646 P2d 809 (1982) the Court cites three cases [**Griffin, Doolittle and Magee**]

where the trial court was not given any indication of how the jurors stood until after the declaration of a mistrial and the jury discharged. In **People v Griffin**, 66 Cal 2d, 58 Cal Rptr 107, 426 P2d 507 (1967) the defendant was tried a second time on a charge of first degree murder, the first conviction of that charge having been reversed on appeal. When the jury at the second trial could not reach a verdict, the judge discharged them and declared a mistrial. The jury foreman then stated in open court that the jury had stood ten for acquittal and two for conviction of second degree murder. At the third trial, the defendant was convicted of first degree murder. On appeal from that conviction he claimed that the jury at the second trial had impliedly acquitted him of first degree murder. The California Court of Appeal rejected the claim of former acquittal reasoning that "We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first

degree murder. There is no reliable basis in fact for such an implication, for the jurors had not completed their deliberations and those voting for second degree murder may have been temporarily compromising in an effort to reach unanimity."

In People v Doolittle, 23 Cal App 3d 14, 99 Cal Rptr 810 (1972) the defendant was on trial for murder. The jury was given the option of convicting him of the charged offense or one of the necessarily included offense or of acquitting him of all offenses. When the jury informed the Court that they could not reach a verdict within those options, the court declared a mistrial and set the case for retrial. Defendant thereafter filed a pretrial motion to enter a plea of once in jeopardy or former acquittal. In that case the jury foreman testified that on the jury's final vote, no juror had voted to convict of first degree murder. The Court of Appeals nevertheless held that no verdict had been reach in the first trial relying

on the Griffin case: "The significant holding in **Griffin** is that the jury, as in the case here, had not completed its deliberations. In the instant case, as in **Griffin**, the ballots taken and voted upon may well have been the result of temporary compromises in an effort to reach unanimity."

In **Magee** v Superior Court, 34 Cal App 3d 201, 109 Cal Rptr 758 (1973) the jury at the defendant's first trial was given the options of acquitting him or of finding him guilty of either the charged offense of kidnapping for the purpose of extortion or of the uncharged lesser included offense of simple kidnapping. The jury was unable to reach a verdict within those options, and a mistrial declared. At the second trial the defendant asserted that the jury had functionally acquitted him of the greater charge. In support of the claim he offered an affidavit of the jury foreman to the effect that the jury had unanimously agreed that he was not guilty

of violating sec. 209, yet was deadlocked on the lesser offense. The affidavit of another juror, however, stated that the jurors never voted or otherwise agreed that defendant should be found not guilty of the greater charge.

The Court in **Stone** points out that the primary concern of the **Griffin** court was to insure that a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case. The members of the jury in **Griffin** never gave any indication of a final intent to acquit the defendant of the murder charge, and the facts in **Doolittle** and **Magee** were similarly equivocal.

In **Griffin**, **Doolittle**, and **Magee** the respective double jeopardy contentions were rejected, notwithstanding the proffered defense affidavits cited above.

The petitioner submits where proffered affidavits concerning jury deliberations are found to be an unreliable basis for

determining the legitimacy of a double jeopardy claim, it necessarily follows that a strained theoretical basis for application of the collateral estoppel doctrine as urged by Justice Cavanagh should likewise be rejected as a basis for prohibiting respondent Garcia's retrial.

The interpretive decisions indicate that there are other factors that must be considered before a court can prohibit a reprosecution based on collateral estoppel.

The Court in **Sanders v State**, 429 So2d 245 (Miss, 1983) points out that to some, collateral estoppel means issue preclusion: where an issue has been litigated in one trial, the losing party is precluded from relitigation. The Court states that if this were all collateral estoppel means, there would be no problem with the application of the doctrine in criminal cases. The Court explains that it may well be useful in analyzing some double jeopardy cases but that:

> **Ashe v Swenson** and progeny, however, construe collateral

> estoppel to mean much more. **Ashe** proceeds on the theory that the jury in the first trial had affirmatively found that Ashe had not been one of the robbers. [cit. om.] Seen in this light, there is a logical infirmity in application of the doctrine of collateral estoppel in criminal cases. That infirmity emerges when one takes seriously the beyond-a-reasonable doubt burden of proof imposed upon the prosecution.

The Court contrasts the collateral estoppel doctrine in the civil case setting stating that the notion works reasonably well where facts are established by a preponderance of the evidence, because their existence is by a factor of 51 to 49 more probable than not. The Court concludes however, that it doesn't work at all in criminal cases because by no stretch of the imagination can a not guilty verdict be said to establish affirmatively that the defendant was innocent of the crime. [429 So2d at pp 251-252]

As stated above, **Ashe** proceeds on the theory that the jury in the first trial had affirmatively found that he had not been one of the robbers. In **Ashe** the

defendant's guilt turned on the issue of identity. The defense offered no testimony and waived final argument. The Court also points that "The jury--though not instructed to elaborate upon its verdict--found the petitioner 'not guilty due to insufficient evidence.'" [Emphasis added] [See also App 23a]

In the case **sub judice** respondent Garcia, as noted above, was tried on the theory of aiding and abetting, using duress as his defense. [App 19a] Justice Cavanagh does not discuss this feature of the trial in his collateral estoppel analysis, [App 44a-54a] whereas, the Justices for reversal point out that the defensive posture of the respondent may have analytical significance to the extent that the jury verdict may be explained in terms of the exercise of lentity. Justice Cavanagh criticizes the discussion as "surmise", [App 61a] but ignores the fact that the Justices for a reversal said that possible explanations for the jury verdict of second degree

murder, renders the verdict as being ambiguous. [App 19a]

In **Lett v State**, 727 SW 2d 367 (Tex App -- Fort Worth 1987) the Court said that collateral estoppel only arises when a prior judgment has resulted in an actual acquittal of the defendant.

In **United States v Dray**, 901 F2d 1132 (CA 1, 1990) the Court said collateral estoppel is applicable only as to those issues actually decided in the earlier case that are foreclosed from relitigation in a later case. The Court also said that "Where it is impossible to discern whether a particular issue was previously resolved in a defendant's favor, the preclusive effect must be denied." (citation omitted) [p 1136].

Based on the record in the instant case of respondent Garcia, your petitioner submits that, as powerful as the arguments of the affirming Michigan Supreme Court Justices may appear, they merely present the Court with a variety of plausible theories as to what ultimate

factual issues were actually decided by the jury in the first trial. [App 34a-54a] The Court in **Dray, supra**, 901 F 2d at p 1140 in considering various plausible theories where collateral estoppel was sought to be invoked said:

> . . . Gossamer strands of possibility and surmise are not the stuff of which the preclusory bar of criminal collateral estoppel may be fashioned. Sturdier threads are needed. On this gauzy record, Dray cannot meet his burden of demonstrating "that the issue whose relitigation he seeks to foreclose was **actually** decided in the first proceeding." (Court's emphasis) (citations omitted)

Justice Cavanagh in his opinion goes to great lengths to advance his collateral estoppel argument. [App 34a-54a] The problem with his argument, in light of **Dray**, is that he does not, and indeed cannot, demonstrate that the jury **actually** decided respondent's criminality on the lesser-included predicate armed robbery charge at the first trial. Accordingly, Petitioner would urge that this Court will determine that the preclusive effect of collateral estoppel should not apply.

This Honorable Court should also be aware of the jurisprudence holding that a general verdict does not provide a reviewing court with a basis for determining the findings of a jury. In **Angstrohm Precision v Vishay Intertechnolgy**, 567 F Supp 537, 543 (ED NY, 1982) the Court states that where:

> [a] judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering court.

Petitioner would urge under the above-referenced juris- prudence that this Court find that collateral estoppel is not applicable since it is impossible to determine the actual basis upon which the jury rendered its verdict of second degree murder in respondent's first trial.

In Garcia v State, 768 SW2d 726 (Tex Crim App, 1987), the Court held that the fact that the defendant's voluntary manslaughter conviction was overturned on

appeal adversely affected his claim of collateral estoppel. The Court explains:

> The doctrine of collateral estoppel was explained in **Ashe v Swenson**, 397 U.S. 436, 90 S Ct 1189, 25 L Ed 2d 469 (1970). The Court stated, "When an ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." **Ashe v Swenson, supra**, 90 S Ct at 1194. This Court has adopted this language that **there must be a final and valid judgment to support a claim of collateral estoppel. Dedrick v State**, 623 SW2d 332 (Tex Crim App, 1981); **Ex Parte Traver**, 725 SW2d 195 (Tex Crim App, 1986). [emphasis added]
> [**Garcia v State**, 768 SW2d at p 728-729]

The Court found that since the pending nature of an appeal can render a judgment "not final" for purposes of a double jeopardy claim, the reversal of a judgment on appeal should eliminate its status as being final and valid for purposes of collateral estoppel. The Court then states:

> An early writer on collateral estoppel discussed this issue. He wrote, "If the unsuccessful party appeals and the judgment is reversed, the original judgment is, of course, no longer conclusive; and if a new judgment is entered for the other party by

> the appellate court or at its direction by the trial court, that judgment is conclusive." Scott, "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1 (1942)
>
> In the instant case the Court of Appeals reversed the judgment and remanded the case to the trial court for a new trial. Using this analysis, not only is the conviction of voluntary manslaughter no longer valid and final, there will be no conclusive judgment on that matter until the appellant receives his new trial. A claim of collateral estoppel cannot flow from an invalid judgment of conviction which is not final.
>
> We hold that the Court of Appeals' reversal of appellant's voluntary manslaughter conviction bars the appellant's claim of collateral estoppel against his trial for attempted capital murder. The indictment for attempted capital murder is not to be dismissed. We reverse the judgment of the Court of Appeals and remand to the trial court. [**Garcia v State**, 768 SW2d at p 729]

In **Ex parte Campbell**, 872 SW2d 48 (Tex, 1994) the Court relying on **Garcia, supra**, and **Ex parte Lane**, 806 SW2d 336, 338 (Tex App --Fort Worth 1991, no pet.) reached the same result stating:

> This Court reversed the judgment of the trial court and remanded the case for a new trial. There is no final and valid judgment of conviction. The

> reversal of a judgment on appeal eliminates its status as being final and valid for purposes of collateral estoppel...

In the case **sub judice**, while Justice Cavanagh and Chief Justice Brickley base their respective collateral estoppel arguments on the **Ashe** case, they overlook the fact that collateral estoppel, as witnessed by the above referenced decisions does not apply because the reversal by the Court of Appeals in defendant's first appeal [App 3a] eliminates its status as being final and valid for purposes of collateral estoppel.

Petitioner respectfully urges that this Court will determine that collateral estoppel does not have legal application to this case, and that defendant's armed robbery conviction should be reinstated and thus affirmed.

[Conclusion]

Wherefore, petitioner respectfully requests that this Honorable Court will grant this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

Dated: August 9, 1995

Respectfully submitted:

_____

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